

Human Rights and HIV Criminalization

Submission to the Office of the UN High Commissioner for Human Rights pursuant to Human Rights Council resolution 47/17 entitled “Human rights in the context of HIV and AIDS” (adopted July 13, 2021)

February 18, 2022

I. Introduction

The [HIV Legal Network](#) (formerly the Canadian HIV/AIDS Legal Network) promotes the human rights of people living with, at risk of, or affected by HIV or AIDS, in Canada and internationally, through research and analysis, litigation and other advocacy, public education, and community mobilization. Since our inception, the HIV Legal Network has worked to limit the use of the criminal law in cases of HIV non-disclosure, exposure, and transmission. We are grateful for the opportunity to make this submission to the Office of the High Commissioner for Human Rights (OHCHR) regarding human rights and HIV criminalization, focusing on the context in Canada.

II. HIV criminalization and human rights

Numerous human rights and public health concerns associated with the criminalization of HIV non-disclosure, exposure or transmission have led UN bodies, including UNAIDS and UNDP,ⁱ the UN Special Rapporteur on the right to health,ⁱⁱ the Global Commission on HIV and the Law,ⁱⁱⁱ and women’s rights advocates^{iv} to urge governments to limit the use of the criminal law to cases of *intentional transmission* of HIV (i.e., where a person knows their HIV-positive status, acts with the intention to transmit HIV, and does in fact transmit it). Notably, the UN Committee on the Rights of the Child has acknowledged the need to review legislation “that criminalizes the unintentional transmission of HIV and the non-disclosure of one’s HIV status”^v and the UN Committee on Economic, Social and Cultural Rights has called on States “to reform laws that impede the exercise of the right to sexual and reproductive health” including laws criminalizing “HIV non-disclosure, exposure and transmission.”^{vi} Recognizing the severe impacts of HIV criminalization on women, the CEDAW Committee has also denounced, in conclusions directed at Canada, the “concerning application of harsh criminal sanctions to women for non-disclosing their HIV status to sexual partners, even when the transmission is not intentional, when there is no transmission or when the risk of transmission is minimal.”^{vii} Additionally, the UN Special Rapporteur on the right to health has described HIV criminalization as an infringement on the rights to health, privacy, equality, and non-discrimination.^{viii}

As UNAIDS has also recognized, laws criminalizing HIV non-disclosure, exposure and transmission “breach human rights, including the rights to equality and non-discrimination” and “undermines effective HIV prevention, treatment, care and support because fear of prosecution can dissuade people from seeking testing and treatment, and deter people living with HIV — or those most at risk of HIV infection — from talking openly to their medical providers, disclosing their HIV status or using available treatment services, all of which undermine HIV prevention efforts.”^{ix} Accordingly, several recommendations in the Human Rights Council resolution on “Human Rights in the context of HIV and AIDS” (hereinafter “Resolution 47/17”) are pertinent to HIV criminalization. In particular, Resolution 47/17 calls on States to “end all inequalities and human rights violations and abuses faced by persons living with, at risk of or affected by HIV”^x and to “take all steps necessary

to ensure respect for and the protection and fulfilment of all human rights and to prevent and eliminate stigma, discrimination, violence and abuse in the context of HIV as an essential part of efforts to achieve the goal of universal access to HIV prevention, diagnosis, treatment, care and support.”^{xi}

III. Canada’s implementation of Resolution 47/17

Based on paired decisions of the Supreme Court of Canada in 2012, people living with HIV can be charged for non-disclosure even if there was no transmission and they had no intention to harm their sexual partner.^{xii} Moreover, and despite recent evolution in court and prosecutorial practice, people living with HIV remain at risk of prosecution for sex that posed no to negligible risk of transmission.^{xiii} People are usually charged with aggravated sexual assault in relation to HIV non-disclosure in Canada — an offence that carries a maximum penalty of life imprisonment and mandatory registration as sexual offender for a minimum of 20 years.

Research in Canada suggests that HIV criminalization likely damages HIV prevention efforts by increasing HIV-related stigma and fear,^{xiv} hindering access to and eroding trust in voluntary approaches to HIV prevention,^{xv} care, and testing^{xvi} and spreading misinformation about the nature of HIV and its transmission.^{xvii} Additionally, research describes significant and wide-ranging harms associated with mandatory sex offender registration in Canada as experienced by people living with HIV convicted of aggravated sexual assault for not disclosing their HIV status to sexual partners.^{xviii} These include family estrangement and internalized stigma, negative impacts to re-entry and reintegration following release from custody, and psychological harms arising from onerous registration requirements and long-term or potential lifetime registration and surveillance.^{xix}

As Resolution 47/17 confirms, “multiple or aggravated forms of discrimination, stigma, violence and abuse often faced by persons living with, presumed to be living with or affected by HIV and by members of key populations have negative consequences for their enjoyment of the highest attainable standard of mental health,” and States are urged to “bring their laws, policies and practices ... fully into compliance with their obligations under international human rights law, and to review or repeal those that are discriminatory or that adversely affect the successful, effective and equitable delivery of, and access to, HIV prevention, diagnosis, treatment, care and support programmes for all persons living with, presumed to be living with, at risk of or affected by HIV, including key populations.”^{xx} Yet, Canada is among the five countries with the most reported HIV prosecutions in the world;^{xxi} by the end of 2020, there were at least 224 known prosecutions for alleged non-disclosure in the country.^{xxii}

Resolution 47/17 also recommends that States “eliminate all forms of sexual and gender-based violence, including intimate partner violence, by adopting and enforcing laws, changing gender stereotypes and negative social norms, perceptions and practices, and providing tailored services that address multiple and intersecting forms of discrimination and violence faced by women living with, at risk of or affected by HIV.”^{xxiii} While criminalization is often described as a tool to protect women from HIV and enhance their autonomy in sexual decision-making, a gendered analysis reveals that it is a blunt, punitive, and inflexible approach to HIV prevention that does little to protect women from HIV infection, violence, or coercion. Research in Canada has shown that the criminalization of HIV non-disclosure exacerbates women’s fear of disclosing their HIV-positive status and intensifies violence against them by providing a tool of coercion or revenge for vindictive partners.^{xxiv} Women who experience rape or sexual assault may also decide not to report to police for fear of non-disclosure charges.^{xxv} The criminalization of HIV non-disclosure can have a particularly serious, adverse impact on HIV-positive women living in precarity, including those with insecure immigration status or in abusive or dependent relationships.^{xxvi} Some of the women convicted of HIV non-disclosure in Canada were survivors of gender-based violence; some were living in socioeconomic insecurity; and some had insecure immigration status or were members of Indigenous and racialized communities who continue to suffer from the effects of colonization,

slavery and racism.^{xxvii} Research has shown that gender power dynamics can make it difficult for Indigenous women living with HIV to either negotiate condom use or to achieve an undetectable viral load that could protect them from criminal prosecutions if they cannot disclose.^{xxviii} Moreover, the criminalization of HIV non-disclosure constitutes an additional layer of colonial violence, control, and surveillance over the bodies, minds, and spirits of Indigenous women living with HIV.^{xxix}

In Canada, the criminal law is also used disproportionately against people living with HIV from some racialized populations. Black men are disproportionately represented among those prosecuted for alleged HIV non-disclosure, and Black and Indigenous people are convicted at a higher rate, acquitted at a lower rate, and are more likely to face prison sentences compared to White people who face similar charges.^{xxx} Meanwhile, media coverage of HIV-related criminal prosecutions has focused disproportionately on Black and/or migrant defendants, and reflected or contributed to troubling racist stereotypes.^{xxxi}

Considering the multitude of harms associated with criminalizing HIV non-disclosure, exposure or transmission, UNAIDS recommends, “Instead of criminalization, states should act to create enabling social and legal environments that support safe and voluntary disclosure of HIV, free of stigma and discrimination” and “ensure access to available, acceptable, affordable HIV prevention, testing and treatment and empower individuals to be able to negotiate safe sex.”^{xxxii}

IV. Recommended actions

In her report, we call on the High Commissioner to make an unequivocal call for all Member States to:

- **End the use of the criminal law against people living with HIV based solely on their HIV-positive status. States should limit the use of the criminal law to the *intentional* transmission of HIV (i.e. where a person knows their HIV-positive status, acts with the intention to transmit HIV, and does in fact transmit it);**
- **Ensure that the criminal law under no circumstances is used against people living with HIV for not disclosing their status to sexual partners where they use a condom, practice oral sex, or have condomless sex with a low or undetectable viral load, or when they did not disclose their status out of fear of violence or other negative consequences;**
- **Invest in universal access to prevention, care, treatment, and support for people living with HIV and in culturally safe supports that reduce the vulnerability of women living with HIV to gender-based violence, including universal access to basic income, housing in a multitude of supportive options, paid sick leave, childcare, legal services, violence against women shelters, and harm reduction services.**

ⁱ See, for example, UNDP and UNAIDS, *UNDP and UNAIDS Policy brief on Criminalization of HIV Transmission*, December 6, 2015 and UNDP, *UNDP Guidance for Prosecutors on HIV Related Criminal Cases*, June 7, 2021.

ⁱⁱ UN Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, Anand Grover, Report on the 14th session, UN General Assembly, agenda item 3, UN Doc. A/HRC/14/20, April 27, 2010.

ⁱⁱⁱ Global Commission on HIV and the Law, *HIV and the Law: Risks, Rights & Health*, July 2012.

^{iv} See the perspectives articulated in the documentary film, *Consent: HIV non-disclosure and sexual assault law* (Goldelox Productions & Canadian HIV/AIDS Legal Network, 2015).

^v UN Committee on the Rights of the Child, *General Comment No. 20*, 2016.

- ^{vi} UN Committee on Economic, Social and Cultural Rights, *General comment No. 22 (2016) on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN doc. E/C.12/GC/22, May 2016, para. 40.
- ^{vii} UN Committee on the Elimination of Discrimination Against Women, *Concluding Observations: Canada*, November 2016, at paras. 42 and 43.
- ^{viii} *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, Anand Grover, at paras. 2, 51.
- ^{ix} UNAIDS, *HIV Criminalization Human Rights Fact Sheet Series* 2021, 2021.
- ^x Human Rights Council, “Human rights in the context of HIV and AIDS (Human Rights Council resolution 47/17),” 13 July 2021, at para. 3.
- ^{xi} *Ibid*, at para. 4.
- ^{xii} *R. v. Mabior*, 2012 S.C.C. 47 and *R. v D.C.*, 2012 S.C.C. 48.
- ^{xiii} HIV Legal Network, *The criminalization of HIV non-disclosure in Canada: Current status and the need for change*, 2019.
- ^{xiv} B. Adam et al., “Impacts of Criminalization on the Everyday Lives of People Living with HIV in Canada,” *Sex Res Soc Policy* (2014) 11: pp. 39–49: DOI 10.1007/s13178-013-0131-8.
- ^{xv} P. O’Byrne et al., “Nondisclosure Prosecutions and HIV Prevention: Results From an Ottawa-Based Gay Men’s Sex Survey,” *Journal of the Association of Nurses in AIDS Care* (2013) 24(1): pp. 81–87, doi:10.1016/j.jana.2012.01.009; P. Byrne et al., “Sexual practices and STI/HIV testing among gay, bisexual, and men who have sex with men in Ottawa, Canada: examining nondisclosure prosecutions and HIV prevention,” *Critical Public Health* (2013) 23:2: pp. 225–236, DOI: 10.1080/09581596.2012.752070; M.A. Kesler et al., “Prosecution of non-disclosure of HIV status: Potential impact on HIV testing and transmission among HIV-negative men who have sex with men,” *PLOS ONE* (2018) 13(2): e0193269.
- ^{xvi} S.E. Patterson et al., “The impact of criminalization of HIV non-disclosure on the health care engagement of women living with HIV in Canada: a comprehensive review of the evidence,” *Journal of the International AIDS Society* (2015) 18, 1: 20572; P. O’Byrne, “Criminal Law and Public Health Practice: Are the Canadian HIV Disclosure Laws an Effective HIV Prevention Strategy?,” *Sex Res Soc Policy* (2012) 9: 70, DOI 10.1007/s13178-011-0053-2; C. Sanders, “Discussing the Limits of Confidentiality: The Impact of Criminalizing HIV Nondisclosure on Public Health Nurses’ Counseling Practices,” *Public Health Ethics* (2014) 7(3): pp. 253–260.
- ^{xvii} E. Mykhalovskiy, “The public health implications of HIV criminalization: past, current, and future research directions,” *Critical Public Health* (2015) 25:4: pp. 373–385; C.L. Galletly & S.D. Pinkerton, “Conflicting Messages: How Criminal HIV Disclosure Laws Undermine Public Health Efforts to Control the Spread of HIV,” *AIDS Behav* (2006) 10: pp. 451–46: DOI 10.1007/s10461-006-9117-3.
- ^{xviii} L. Michaud et al., *Harms of Sex Offender Registries in Canada among people living with HIV*, November 2021.
- ^{xix} *Ibid*.
- ^{xx} Resolution 47/17, at paras 17 and 7.
- ^{xxi} E. J Bernard, “2021 in review: more successes, more challenges, much more to do,” *Opinion*, December 17th 2021.
- ^{xxii} C. Hastings et al., *HIV Criminalization in Canada: Key Trends and Patterns (1989–2020)*, HIV Legal Network, 2022 (forthcoming).
- ^{xxiii} Resolution 47/17, at para. 13.
- ^{xxiv} WATCH, *Brief to the Standing Committee on Justice and Human Rights Study on the criminalization of non-disclosure of HIV Status*, April 29, 2019 and S. Green et al., “How women living with HIV react and respond to learning about Canadian law that criminalises HIV non-disclosure: ‘How do you prove that you told?’” *Culture, Health & Sexuality* (2019), DOI: 10.1080/13691058.2018.1538489.
- ^{xxv} Center for Gender and Sexual Health Equity, *Gendered Impact of Criminalization of HIV Non-Disclosure: Implications for Prosecutorial Guidelines in BC. Research for policy*, 2018; C. Kazatchkine and L. Gervais, “Canada’s newest sex offenders,” *Winnipeg Free Press*, March 8, 2016; and Canadian HIV/AIDS Legal Network, “Women and the Criminalization of HIV Non-Disclosure,” info sheet, 2012.
- ^{xxvi} P. Allard, C. Kazatchkine and A. Symington, “Criminal prosecutions for HIV non-disclosure: Protecting women from infection or threatening prevention efforts? in J. Gahagan (ed) *Women and HIV Prevention in Canada: Implications for Research, Policy, and Practice* (Toronto: Women’s Press, 2013): pp. 195–218.
- ^{xxvii} See, for example, A. McClelland, *The Criminalization of HIV in Canada: Experiences of People Living with HIV*, November 21, 2019 and *R. v. Schenkels*, 2015 MBQB 44.
- ^{xxviii} A. Krüsi et al., “Positive sexuality: HIV disclosure, gender, violence and the law - A qualitative study,” *PLOS ONE*, 13(8): e0202776, 2018 and A. Krüsi et al., “Marginalized women living with HIV at increased risk of viral load suppression failure: Implications for prosecutorial guidelines regarding criminalization of HIV non-disclosure in Canada and globally,” 22nd International AIDS Conference in Amsterdam, Netherlands, July 2018
- ^{xxix} A. Sanderson et al., “Indigenous Women Voicing Experiences of HIV Stigma and Criminalization Through Art,” *International Journal of Indigenous Health* (2021) 16:2.
- ^{xxx} C. Hastings et al, *supra* note 22.
- ^{xxxi} E. Mykhalovskiy et al., “Explicitly racialised and extraordinarily over-represented: Black immigrant men in 25 years of news reports on HIV non-disclosure criminal cases in Canada,” *Culture, Health & Sexuality* (2020) DOI: 10.1080/13691058.2020.1733095.
- ^{xxxii} *HIV Criminalization Human Rights Fact Sheet Series* 2021, *supra* note 9.